

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re:

Procedures Regarding the Prison Litigation
Reform Act and the Antiterrorist and
Effective Death Penalty Act.

EMERGENCY GENERAL ORDER
FILED October 1, 1996

Before **SEYMOUR**, Chief Judge, **PORFILIO**, **ANDERSON**, **TACHA**, **BALDOCK**,
BRORBY, **EBEL**, **KELLY**, **HENRY**, **BRISCOE**, **LUCERO**, and **MURPHY**, Circuit Judges.

Passage of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804, and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, § 104, requires new procedures in the courts of this circuit. The following standards and procedures shall be implemented immediately in all cases to which these statutes apply.

Pursuant to the Prison Litigation Reform Act, all prisoners bringing civil actions or appeals shall pay the full amount of the filing fee. 28 U.S.C. § 1915(b)(1). Consequently, if the prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility for, and make the assessment of, a partial filing fee under the Act. If the prisoner has sufficient funds, the entire

Emergency General Order of October 1, 1996, Page 2

filing fee shall be assessed immediately. The partial fee determination must take place regardless of whether the prisoner's status was examined at the time the complaint or other initial pleading was submitted to the district court. The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for paying less than the full filing fee. When the district court makes its determination it shall enter an order and send a copy to this court. If the in forma pauperis application reveals that the prisoner has no assets and no means to pay an initial partial filing fee, 28 U.S.C. § 1915(b)(4), the district court's determination order must reflect that finding.

The appellant shall authorize the custodian to deduct payments from the institutional account and the custodian will pay the assessment. Notice shall be given to this court if the prisoner does not provide the information required under the Act or does not authorize payment from his or her institutional account. Filing fee payments shall be made to the clerk of the district court pursuant to Fed. R. App. P. 3(e).

Under the amendments contained in the Antiterrorist and Effective Death Penalty Act, no appeal may be taken in either state habeas cases or federal 28 U.S.C. § 2255 proceedings unless a certificate of appealability issues. 28 U.S.C. § 2253(b). Section 2253 provides that certificates to appeal should be issued, if at all, by a circuit justice or judge. Recognizing the conflict between this statute and the language of Federal Rule of Appellate Procedure 22(b), to achieve consistency within the circuit, this court directs the district courts to consider the propriety of

Emergency General Order of October 1, 1996, Page 3

issuing certificates of appealability in the first instance. Failure of the district court to issue a certificate of appealability within thirty days of filing the notice of appeal shall be deemed a denial.

If denied by the district court, petitioner-appellants will be required to brief any request for a certificate of appealability in this court and address the merits of their appeals at the same time. 10th Cir. R. 22.1. Respondent-appellees shall not file a brief until requested to do so by this court.

During the pendency of this order, the court will evaluate its effectiveness. The court invites interested parties to send written comments to the clerk of court. After evaluation, the court will decide whether the order should be vacated or whether its provisions should be incorporated into the rules of court.

ENTERED FOR THE COURT

Patrick Fisher, Clerk